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Chairperson: Ms. Picco (Monaco)

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The meeting was called to order at 3.10 p.m.

Agenda item 79: Report of the International Law Commission on the work of its sixty-second session
(*continued*) (A/65/10 and A/65/186)

1. **Mr. Wisnumurti** (Chairman of the International Law Commission), introducing chapter VI of the report of the International Law Commission on the work of its sixty-second session (A/65/10), recalled that the Commission had concluded the first reading of the draft articles on the effects of armed conflicts on treaties at its sixtieth session and had decided to transmit those draft articles, through the Secretary-General, to Governments for comments and observations.

2. At the 2010 session, the Commission had begun the second reading. The Commission had had before it the first report (A/CN.4/627 and Add.1) of the Special Rapporteur on the topic, together with a compilation of written comments and observations received from Governments on the first reading (A/CN.4/622 and Add.1). In his report, the Special Rapporteur had confirmed his general preference for retaining the broad outlines of the first reading draft articles, while focusing on the suggestions of Member States for improvement. His report included an analysis of the comments and observations of Member States, together with proposals for a complete set of draft articles to be considered by the Commission on second reading.

3. Draft articles 1 and 2 addressed the issues of scope and use of terms. The key question was whether to include internal armed conflicts within the scope of the draft articles. The Special Rapporteur had proposed retaining the inclusive approach, so as to also cover such conflicts within the scope of the draft articles. At the same time, he had proposed a new formulation for the definition of armed conflicts, in article 2 (b), based on the definition used in 1995 by the International Criminal Tribunal for the Former Yugoslavia in the *Prosecutor v. Duško Tadić* case. The question of occupation would be left for discussion in the commentary. The proposals had received the support of the majority of the Commission, although some members had spoken in favour of the first reading of the text.

4. A further issue was whether the draft articles should apply to treaties involving international organizations. The Special Rapporteur had expressed a

preference for one Member State's suggestion that the matter should be reserved until after the conclusion of the work on the current draft articles. Questions had been asked as to whether that approach would cast doubt on the applicability of the draft articles to major law-making conventions to which international organizations also happened to be parties. The example of the participation of the European Union in the United Nations Convention on the Law of the Sea (1982) had been cited as one such instance. The Special Rapporteur believed that the fact that an international organization participated in a treaty regime should not in itself exclude the treaty from the scope of the draft articles. He had proposed a saving clause, reproduced in paragraph 203 of the report.

5. Draft article 3 addressed the absence of a rule under which, in the event of an armed conflict, treaties were ipso facto terminated or suspended. There had been general agreement in the Commission that the provision was central to the draft articles, and that its substance, as adopted on first reading, ought to be retained. A difference of opinion had arisen, however, as to the nature of the provision and, in particular, whether it established a presumption in favour of continuity, or one against discontinuity, as a consequence of the outbreak of armed conflict.

6. Draft article 4, on the indicia of susceptibility to termination, withdrawal or suspension of treaties, had largely been retained in the first reading formulation. The Special Rapporteur had proposed clarifying the reference to articles 31 and 32 of the Vienna Convention on the Law of Treaties by reintroducing a reference to the intention of the parties. However, several members had recalled that a similar proposal by the first Special Rapporteur had not been well received in the Commission or in the Sixth Committee. The Special Rapporteur had subsequently withdrawn his proposal.

7. Draft article 5 dealt with the operation of treaties on the basis of implication from their subject matter. The Special Rapporteur had proposed retaining the provision in the draft articles. Along with the annex of categories of treaties and draft article 4, it provided indications for determining whether a treaty survived the outbreak of an armed conflict. Following a suggestion by a Member State, he had also made a proposal for an additional paragraph expressly establishing the applicability during armed conflict of treaties relating to the protection of human beings, as

well as the continued applicability of the Charter of the United Nations. However, that proposal was not his preference because it risked establishing two tiers of categories of treaties, and the distinction between them might be difficult to substantiate in practice.

8. The annexed list, which was indicative in nature, had by and large retained the categories proposed at first reading. The proposal for a new second paragraph had not garnered substantial support; the preponderance of views favoured retaining the list of categories in the form of an annex.

9. Draft articles 6 and 7 discussed the conclusion of treaties during armed conflict and the question of express provisions on the operation of treaties. The Special Rapporteur's report had suggested only limited modifications, such as locating draft article 7 as draft article 3 bis. The debate on the two draft articles had revealed general support for the proposal.

10. Draft article 8 addressed the procedure for notification of termination, withdrawal or suspension. The Special Rapporteur had sought to revisit the position taken by the Commission at first reading, namely that it was not realistic to impose a regime of peaceful settlement of disputes. Accordingly, he had proposed new paragraphs 4 and 5 to address that issue. He had also noted that the first reading draft had been criticized for not including an express time limit for the making of the notification. In his view, it was not inconceivable to expect States to make notifications and objections during armed conflict. He had proceeded to draw inspiration from article 65 of the Vienna Convention on the Law of Treaties by expressly including a time limit. However, he had not made a specific proposal for the limit. During the debate, suggestions had varied from three to six months. One general suggestion was that the provision should be cast in sufficiently flexible terms in order to allow for the possibility that, in some cases, notification would not be necessary.

11. Draft articles 9 and 10 dealt respectively with the obligations imposed by international law independently of a treaty and with the separability of treaty provisions. The Special Rapporteur had proposed retaining them largely as adopted on first reading; neither had given rise to serious opposition in the comments from Governments. The Commission had supported that view.

12. Draft article 11 addressed the loss of the right to terminate, withdraw from or suspend the operation of a treaty; draft article 12 dealt with the resumption of treaties. The Special Rapporteur had proposed retaining draft article 11 largely as adopted on first reading, although the effect of an armed conflict on a treaty was sometimes best evaluated in hindsight. He had proposed that draft article 12 should be amended through the inclusion of the substance of draft article 18, as adopted on first reading, which dealt with the situation of a "novation" of the treaty through an agreement brokered after the conflict. The proposal had enjoyed general support.

13. Draft article 13 considered the effect of the exercise of the right to individual or collective self-defence. After analysing the various suggestions contained in the comments of Governments, the Special Rapporteur had proposed retaining the provision as adopted on first reading. While there had been agreement in the Commission on the inclusion of such a provision, a variety of suggestions had been made as to its structure and formulation, as well as that of its title.

14. Draft article 15 dealt with the prohibition of benefit to an aggressor State. The Special Rapporteur had proposed making it clear that the conflict referred to in that article resulted from the aggression referred to at the beginning of the article, thereby avoiding the interpretation that the characterization of a State as an aggressor automatically extended to other conflicts. A difference of opinion had emerged as to the inclusion of an express reference to General Assembly resolution 3314 (XXIX). Different views had been expressed with regard to a proposal to expand the scope of the provision in order to cover resort to armed force in contravention of Article 2, paragraph 4, of the Charter of the United Nations.

15. Draft articles 14, 16 and 17 addressed respectively the decisions of the Security Council, the rights and duties arising from the laws of neutrality, and other cases of termination, withdrawal or suspension. They had not given rise to controversy. Except for an alternative, more general, formulation for draft article 17, the Special Rapporteur had largely retained the versions as adopted on first reading. General support had been expressed for all three provisions, including for the Special Rapporteur's proposal to include a reference to the "provisions of the treaty" in draft article 17.

16. The entire set of draft articles, as proposed by the Special Rapporteur, had been referred to the Drafting Committee, which had been able to make progress. It was anticipated that the second reading of the draft articles would be concluded at the forthcoming session.

17. Work on the topic “Protection of persons in the event of disasters” had been undertaken in two separate phases. First, the Commission had adopted draft articles 1 to 5, together with the commentaries. Those draft articles had been adopted by the Drafting Committee in 2009, but the Commission had had time only to take note of them. The Commission had also considered the Special Rapporteur’s third report (A/CN.4/629), which contained proposals for draft articles 6 to 8.

18. Draft article 1 established the overall orientation of the draft articles as being primarily focused on the protection of persons whose life, well-being and property were affected by disasters. The scope *ratione personae* of the draft articles was limited to natural persons affected by disasters. The emphasis was primarily on the activities of States and international organizations and other entities enjoying specific international legal competence in the provision of disaster relief and assistance. While the focus *ratione temporis* was on the immediate post-disaster response phase, it had been agreed that the draft articles should also, where relevant, cover the pre-disaster phase.

19. Draft article 2 outlined the purpose of the draft articles. The main point at issue related to the juxtaposition of “needs” and “rights”. The Commission had chosen a formulation that emphasized the importance of a response which adequately and effectively met the needs of persons affected by the disaster, and which took place with full respect for the rights of such individuals. “Adequate and effective” referred to a high-quality response meeting the needs of the affected persons, and implied an element of timeliness. Specific provisions would consider what made a response “adequate” and “effective”.

20. Draft article 3 established a definition of “disaster” for the purposes of the draft articles. The definition emphasized the existence of an event which caused the disruption of society, and it included a number of qualifying phrases. It took into account the definition adopted in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Management and Relief Operations (1998).

An element of timeliness was implicit in the word “effective”. That and other aspects of what made a response adequate and effective would be the subject of specific provisions. Paragraphs 3 to 8 of the commentary to draft article 3 discussed the various ways in which the definition was qualified. The approach consisted of establishing a higher threshold for the applicability of the draft articles.

21. Draft article 4 covered the relationship of the draft articles with international humanitarian law, particularly the extent to which situations of armed conflict were covered by the draft articles. The provision had been carefully formulated so as to give precedence to the rules of international humanitarian law where applicable. Nonetheless, no categorical exclusion of situations of armed conflict had been made. Such exclusion could prove counterproductive in “complex emergencies”, where a disaster occurred in the same arena as an armed conflict. Hence, while the draft articles did not seek to regulate the consequences of armed conflict, they could nonetheless apply in such situations to the extent that existing rules of international law did not apply.

22. Draft article 5 recognized the basic duty of States to cooperate among themselves and with the United Nations and other competent international organizations and entities. The duty to cooperate was well established as a principle of international law. Nonetheless, it should not be interpreted as diminishing a sovereign State’s prerogatives within the limits of international law. It was complementary to the primary duty of the affected State to take care of the victims of natural disasters and similar emergencies occurring in its territory. It had been agreed that the latter issues would themselves be the subject of specific provisions.

23. Draft article 6 recalled the key humanitarian principles of humanity, neutrality and impartiality applicable in the context of disasters. The principle of neutrality referred to the apolitical nature of action taken in disaster response. The principle of impartiality had three components: non-discrimination, proportionality between the degree of suffering and urgency, and the obligation not to draw a substantive distinction between individuals on grounds other than need. The principle of humanity lay at the meeting point between international humanitarian law and international human rights law. It was an expression of general and essential

values, which provided guidance in times of both war and peace.

24. Draft article 7 addressed the concept of human dignity, a fundamental principle underlying all human rights. By including that principle alongside those elaborated in draft article 6, the Special Rapporteur had sought to provide a complete framework guaranteeing respect for the protection of human rights, making it unnecessary to elaborate a list of specific rights.

25. Draft article 8 dealt with the question of the primary responsibility of the affected State, which had been expressly reserved in the context of the work on draft article 5. The new provision reflected the underlying principles of sovereignty and non-intervention. In principle, it was for the affected State to adopt legitimate measures to guarantee the protection of persons on its territory. Other entities, whether States or international organizations, were restricted to acting in accordance with draft article 5. That did not mean that the affected State's responsibility was exclusive in nature. A range of views had been expressed in the Commission, including on the related question of the requirement that assistance from other States and actors be provided with the consent of the affected State.

26. The three draft articles had been referred to the Drafting Committee, which had made substantial progress on almost all of the issues raised therein. The Drafting Committee had submitted a report containing several draft articles. Owing to lack of time, the Commission had only taken note of that report and expected to consider it at its forthcoming session.

27. **Mr. Kaukoranta** (Finland), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the Nordic countries had repeatedly expressed a preference for the development of a set of principles covering all relevant rules pertaining to the expulsion of aliens, rather than draft articles codifying customary law to fill gaps in existing treaty law. The Special Rapporteur's treatment of the topic deviated considerably from the principal theme into tangential areas of law, such as labour migration, that did not require the Commission's consideration. A State's right to expel aliens was inherent in the sovereignty of States, but that right must be exercised in accordance with international law. In striking the correct balance, account should be taken of the current challenges to the international order,

which were indeed addressed in the report. The Nordic countries would appreciate it, however, if the Special Rapporteur would make it clear what his intentions were with his study of the topic and if the Commission would take note of the views of Member States regarding what was in need of codification and what was not.

28. With respect to the topic "Effects of armed conflicts on treaties", the Nordic countries continued to hold to the view that the scope of the draft articles should include the effects of internal armed conflict, since such conflicts could affect the operation of treaties as much as international armed conflicts. Moreover, the scope should not be restricted to treaties between two or more States of which more than one was a party to the armed conflict, as that would limit the usefulness of the draft articles. On the question of whether to cover treaties to which international organizations were parties, the Nordic countries were of the view that international organizations could not as such become parties to armed conflicts. However, the obligations of States members of an organization in a situation of armed conflict merited further study.

29. As to the use of terms, the definition of armed conflict should take modern developments into account. The wording used in 1995 by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Prosecutor v. Duško Tadić* case, with the modification proposed by the Special Rapporteur, could fulfil that purpose.

30. With respect to draft article 5, which concerned treaties the subject matter of which implied that the operation of the treaty, or of some of its provisions, was not affected by armed conflict, it should be noted that there were situations in which the operation of such a treaty or some of its provisions might be suspended for the duration of an armed conflict. Moreover, treaty provisions that continued in operation might not necessarily be applied unchanged. Some basic treaty principles needed to be taken into account, however, during armed conflict. It might be appropriate to have a draft article containing a statement of principle to that effect. The Nordic countries questioned the usefulness of including an indicative list of categories of such treaties in draft article 5. It would be more practical to consider on a case-by-case basis whether a specific treaty or some of its provisions would continue to operate during an armed conflict. A

list of specific treaties might be included in the commentary.

31. The Special Rapporteur on the protection of persons in the event of disasters was to be commended for his excellent work on the topic. With regard to draft article 9 as provisionally adopted by the Drafting Committee, the Nordic countries agreed that it was the primary duty of the affected State to ensure the protection of persons and the provision of disaster relief. The State where the disaster had taken place was best placed to assess the need to protect and assist. However, the affected State's responsibility should not be regarded as exclusive. It would be important to strike the right balance between State sovereignty and the duty to cooperate. When the affected State did not have the capacity or the will to protect and provide relief to persons affected by the disaster, it should seek assistance from other States and international organizations in accordance with draft article 5. The Commission should clarify further the scope and limits of the affected State's exercise of its primary responsibility to protect persons affected by a disaster.

32. The foregoing comments referred to situations other than armed conflicts. In a situation of armed conflict the parties to the conflict were already under an obligation to allow and provide for humanitarian assistance. It would be valuable for the Commission, as it proceeded to consider the topic, to take into account the distinction to be made depending on whether or not an armed conflict existed in the event of disaster.

33. **Mr. Lindenmann** (Switzerland) said that, in view of the excellent work done by the Commission over the years, it was regrettable that for the second consecutive year the Commission had lacked the time to address the topic of immunity of State officials from foreign criminal jurisdiction, which was a subject of particular relevance to those who worked on a daily basis with international law and was also an area in which international law was evolving.

34. With regard to the topic of expulsion of aliens, his delegation would like to know what criteria had been used to define the categories of children, older persons, persons with disabilities and pregnant women mentioned in revised draft article 13, since it was desirable to be as precise as possible. In paragraph 1 of revised draft article 14, which prohibited expulsion or refoulement to a State where the right to life or personal liberty was in danger of being violated, the

word "notably" should be inserted before the phrase "because of his or her race, religion, nationality, membership of a particular social group or political opinions" in order to show that the list of reasons was not exhaustive. Lastly, with regard to draft article A1, his delegation wondered whether it was wise to make a distinction based on the duration of the alien's presence in the expelling State in terms of the procedural guarantees available.

35. Under the topic of effects of armed conflicts on treaties, his delegation supported the new definition of armed conflict in article 2, paragraph (b), which was based on the formulation used in the *Tadić* case; the new wording covered internal armed conflict and no longer mentioned "armed operations" or "state of war". It appeared also to cover occupation, a point that could be clarified in the commentary. With regard to draft article 5, his delegation regretted that its proposal for a second paragraph that would have added the category of treaties relating to the protection of the human person, including international humanitarian law, human rights law and international criminal law, among those that would remain or become operative in the event of armed conflict had not received the support of a majority of the Commission. However, it was pleased to note that the categories of treaties relating to international criminal justice and treaties which were constituent instruments of international organizations were to be added to the annexed list. Lastly, his delegation reiterated its support for broadening the scope of draft article 15 to include any threat or use of force in violation of the prohibition set out in Article 2, paragraph 4, of the Charter of the United Nations.

36. On the topic of protection of persons in the event of disasters, his delegation noted with appreciation that in the commentary to article 1 the Commission had emphasized the rights and obligations of States in relation to persons in need of protection. With regard to draft article 3, his delegation was in favour of delimiting the definition of disaster so as to exclude other serious events that might also disrupt the functioning of society. However, the criterion of a serious disruption of the functioning of society could lead to an undesired outcome. The explanation in paragraph (4) of the commentary that an event which resulted in widespread loss of life but did not seriously disrupt the functioning of society would not satisfy the threshold requirement could be taken to mean that a

disaster that did not disrupt the society as a whole, such as an earthquake in a remote area of a country populated by an ethnic minority, did not entail the Government's obligation to protect. Such a conclusion would conflict with the principle of impartiality.

37. With regard to draft article 6, his delegation supported the reference to the principles of humanity, neutrality and impartiality and wished to underline in particular the importance of neutrality. It was imperative that those providing assistance should carry out their activities with the sole aim of responding to the disaster in accordance with humanitarian principles and should not pursue a political agenda. Draft article 7 on human dignity served as an additional reminder that people were the central concern of the draft articles.

38. His delegation welcomed the version of draft article 9 provisionally adopted by the Drafting Committee. It was an improvement to speak clearly of the affected State's "duty" to ensure the protection of persons and provision of disaster relief, rather than its "responsibility", and to omit the provision that external assistance could be provided only with the consent of the affected State, which gave that State a pretext for refusing assistance.

39. **Mr. Hernández García** (Mexico) said that, with regard to the important topic of the expulsion of aliens, a number of the draft articles that related to one another or to other international instruments could lead to contradictory interpretations if they were not rearranged. His delegation urged the Special Rapporteur to be aware of that point when undertaking his announced restructuring of the draft. The draft articles could be divided into two main chapters, one related to the rights and obligations of States and another to the rights of persons subject to expulsion. Further, the provisions on the substantive rights of aliens subject to expulsion could be grouped under one section and the provisions on their procedural rights under another. It might also be wise to revise the wording of certain draft articles, such as draft article 4 (Non-expulsion by a State of its nationals) and draft article 7 (Prohibition of collective expulsion) that began by establishing an absolute prohibition and were followed by paragraphs suggesting that there were exceptions to the prohibition.

40. In codifying the rules of international law regulating the right of a State to expel an alien and the correlative obligation of the State of origin to receive

its national, the key element should be the protection of the human rights of the individual subject to expulsion, particularly the right to due process. Any wording suggesting that the draft was about migratory control or that it was intended to modify existing international instruments on asylum, refugees, extradition, international judicial assistance or transnational organized crime should be avoided. His delegation noted with satisfaction that the draft articles reflected the principles of legality and due process, and it approved the provision of draft article 9 (Grounds for expulsion) whereby grounds must be given for any expulsion decision and the provision of draft article B1 whereby an alien could be expelled only in pursuance of a decision reached in accordance with law.

41. It was of paramount importance to analyse more closely the distinction made in the draft articles between legal resident aliens and aliens with irregular status in terms of the procedural guarantees assigned to each category, as well as the proposal to distinguish between aliens with irregular status depending on the length of time they had been living in the country. Some minimal procedural safeguards should be recognized as applicable to all aliens.

42. Moreover, some draft articles should be reconsidered in terms of their relationship to other areas of international law. Draft article 8 (Prohibition of extradition disguised as expulsion), for example, dealt with expulsion in relation to extradition, whereas expulsion and extradition were legal concepts of different natures and should be treated separately. A person might be subject to extradition under a treaty or in accordance with the principle of reciprocity, which were matters quite distinct from the grounds for expelling an alien. With regard to the bracketed phrases in draft articles 5 and 6 that referred to terrorism as a possible ground for expulsion of a refugee or stateless person, his delegation believed that it was neither necessary nor pertinent to mention terrorism or any other international crime, since the right of expulsion should not be considered as exempting the expelling State from the obligation to prosecute or extradite. Furthermore, it was essential that paragraph 1 of revised draft article 10, which dealt with the principle of non-discrimination, should be redrafted to make it fully consistent with international human rights treaties. Although his delegation understood the spirit of the text, it could lead to misinterpretation as currently formulated and should be redrafted from the

perspective, not of the State's right to expel, but of the limits to that right.

43. **Ms. Daskalopoulou-Livada** (Greece), speaking on the topic "Expulsion of aliens", said that the purpose of the proposed text was somewhat ambiguous. In preference to its current resemblance to a treaty text in terms of its pattern and detailed provisions, it should contain fundamental and general principles insofar as many of the matters covered were far from settled or conclusive in international law and did not consequently lend themselves to codification or even to progressive development of the law. The draft articles would also need to be restructured in order to improve their systematic coherence.

44. With regard to revised draft article 9, on the obligation to respect the dignity of persons who had been or were being expelled, she reiterated her delegation's view that the dignity of such persons was undoubtedly a commendable principle meriting special mention. It did not amount to a right, however, its value being rather that of an overarching principle. In the eventual light of the proposed text as a whole, that mention might subsequently be best placed in the preamble or in a general part of the text.

45. Concerning revised draft article 11, on the obligation to protect the lives of those persons, her delegation attached importance to the application of paragraph 2 thereof also in the territory under the jurisdiction of the expelling State, a principle that had in fact been confirmed by international judicial or quasi-judicial bodies.

46. With reference to the issue of "disguised expulsion", the situations dealt with in draft article A on prohibition of disguised expulsion were either real, existed or might exist, as had indeed been borne out by the experience of historical events. The text, however, was insufficiently clear and also so broad as to cover situations that should perhaps be excluded from its ambit. Furthermore, it might in some instances, whether inadvertently or otherwise, include cases that extended beyond mere expulsion to the possible point of criminal action, such as the forcible transfer of a population, which was an entirely different question governed by separate rules. In any event, the term "disguised expulsion" should be recast as already suggested by members of the Commission.

47. With regard to draft article 8, on prohibition of extradition disguised as expulsion, the issue behind the

proposed text was unclear; extradition was a very specific official procedure between two States under which expulsion was, by definition, impossible. If the text was intended to refer to collusion between the requesting and requested States, it should be altered to that end. On that score, the Special Rapporteur's newest revision of the draft article was a slight improvement.

48. Concerning draft article 9, on grounds for expulsion, the lawfulness of the presence of the expelled person appeared to be a determining factor and was indeed a distinction that should play an important role throughout the text. As to the grounds themselves, the main concern was not to enumerate them exhaustively but to balance the interests of the expelling State and the person under expulsion, while at the same time ensuring the conformity of all grounds for expulsion with international law.

49. Lastly, her delegation shared the view that draft article C1, on procedural rights of aliens facing expulsion, should formulate general principles enshrined in international law; the task was not one of elaborating a detailed human rights instrument.

50. Turning to the draft articles on the topic "Protection of persons in the event of disasters", she said that the comprehensive list of principles governing disaster response contained in draft article 6 embodied elements — albeit encompassing a significant measure of overlap — that were useful in clarifying the underpinnings of third-State conduct with respect to a disaster that occurred in another State. While constituting a motivating factor and an overarching idea in all disaster-response operations, the first-mentioned principle of humanity was scarcely measurable in legal terms. It was not therefore commensurate with the other principles cited and should, for practical purposes, be accordingly qualified for what it was and placed in a declaratory part of the text, in all likelihood the preamble. Conversely, the principles of impartiality and non-discrimination were well-accepted legal principles found in numerous binding legal texts. As to the principle of neutrality, it was closely connected to armed conflict, which had nonetheless been expressly excluded from the scope of the draft articles. In time of peace, impartiality and non-discrimination would cover the same ground.

51. Concerning draft article 7, on human dignity, the reiteration of the obligation to respect and protect the

inherent dignity of the human person was entirely apposite in responding to disasters; although it was not entirely quantifiable in legal terms, human dignity was again an overarching concept that should be taken into account in such situations. It should therefore be suitably positioned within the text in the same spirit as the approach taken in connection with the principle of humanity.

52. Draft article 8 was of doubtful usefulness. Given that respect for human rights was an imperative under the multiple treaty obligations binding on the international community, any mention of the subject in the context of disaster seemed immaterial; there was no reason whatsoever to consider that persons affected by disaster might ever be thought of as deprived of their human rights. Indeed, such a mention could even prove risky by giving the false impression of a need to confirm the applicability of human rights in other similar texts, thereby casting doubt on the provision's interplay with certain well-known provisions of human rights instruments concerning derogable human rights in cases of emergency.

53. Given that it now dealt with the role of the affected State, draft article 9 posed a complex task insofar as it touched on fundamental issues that were not devoid of controversy. That task should therefore be approached with a view to clarity and sincerity of intention, which the current text failed to convey. Despite its shortcomings, the text originally proposed by the Special Rapporteur addressed the matter more successfully, confirming as it did the consent requirement with respect to the acceptance of humanitarian assistance by the affected State. It was nevertheless essential to mitigate that confirmation and thus ensure that any eventual refusal was neither arbitrary nor detrimental to the basic rights and needs of the affected population. That delicate balance could be achieved through a reminder of the duty of the affected State to ensure the protection of the population and also through the reiteration of that State's duty to cooperate with other States to that end.

54. **Mr. Duan** Jielong (China) expressed the hope that the information submitted by his Government on Chinese law and practice with respect to the expulsion of aliens would serve as a source of reference for the International Law Commission in its work on that topic. In that regard, his delegation endorsed the concepts and principles embodied in the draft articles revised by the Special Rapporteur with a view to

addressing concerns about the human rights of persons who had been or were being expelled. Insofar as those articles were intended to establish international legal principles rather than specific implementation standards governing the expulsion of aliens, they should neither be too detailed nor incorporate rights that were yet to be universally accepted by the international community. In particular, they must wholly exclude any possibility allowing States to make a unilateral evaluation of the judicial system and human rights situation in receiving States; such a possibility could be easily abused and result in unnecessary disagreements among States. Appropriate changes should therefore be made to revised draft article 14, paragraph 2, and revised draft article 15, paragraph 2.

55. Providing as it did a comprehensive analysis of the relevant issues on the basis of a large body of legal information and State practice, the sixth report of the Special Rapporteur (A/CN.4/625 and Add.1) was a positive contribution to the creation of an appropriate procedure for expulsion and for protection of the rights of persons who had been or were being expelled. The current text of draft article A was too general, however, and also failed to make an accurate distinction between disguised expulsion, which violated the rights and interests of aliens subject to expulsion, and legitimate administrative actions by States. The result might be to impose inappropriate constraints on the exercise of State sovereignty.

56. With regard to draft article 8 on prohibition of extradition disguised as expulsion, nothing should stand in the way of extradition of an alien to a requesting State when all conditions for expulsion had been met and the expulsion itself did not contravene international or domestic law. Given the ever-increasing complexity and sophistication of transnational crimes, States should be encouraged to identify flexible, practical and effective means of cooperation. He therefore proposed that the draft article should be deleted; failing that, it should be reworded for the purpose of reflecting that well-grounded concern.

57. With respect to draft article B, on the obligation to respect the human rights of aliens who were expelled or were being detained pending expulsion, specifically subparagraphs 1 (a) and (b) thereof, the act of expulsion per se was a prescribed penalty that might well have been imposed following a due process of

criminal proceedings. In such circumstances, detention of the person concerned was inevitably punitive in nature; it was neither possible nor necessary, in the light of that person's criminal identity, for the detention to be carried out in a place other than a facility in which persons sentenced to penalties involving deprivation of liberty were detained. Furthermore, capacities for a separate place of detention might be non-existent in the judicial system of expelling States. Given those considerations, he suggested a revision of the draft article with a view to building in flexibility, where appropriate.

58. As for the draft articles on the effects of armed conflicts on treaties, the definition of "armed conflict" contained in draft article 2, namely the one used by the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* decision, was admittedly succinct. However, its use of the term "protracted" as a threshold for determining whether an armed conflict fell within the scope of the draft articles was not conducive to the stability of treaty relations, as any and all use of armed force might consequently be included in the category of armed conflict defined under the draft articles, irrespective of any real effects on the application of treaties. The draft article would be improved by drawing on the definition of armed conflict contained in the Geneva Conventions of 1949 and in Additional Protocol II thereto, with a view to arriving at a definition that was accurate and stringent enough to garner broad international support.

59. Concerning draft article 5, the treaties enumerated in paragraph 2 did not match those set forth in the indicative list of categories of treaties contained in the annex to the draft article, a discrepancy that could give rise to questions as to the relationship between the treaties enumerated in each case and as to the exhaustiveness of those listed in paragraph 2. The latter, for instance, could be interpreted as indicating treaties with respect to which the operation was altogether beyond the effect of armed conflict in any circumstances, although whether paragraph 2 would attract sufficient support in international practice was doubtful.

60. The draft article provided no conclusive answer concerning the specific factors that might determine the continued operation of a treaty. It was therefore equally doubtful whether the understanding and application of the draft article would be enhanced by the incorporation of paragraph 2 unless it was based on

a definite conclusion and its enumeration was exhaustive. Such an enhancement would be fostered by including in the annex an indicative list of treaties with respect to which the operation would be unaffected in the event of armed conflict, as had been done in the draft articles on first reading. His delegation looked forward to a resumption of that approach, with clarifications set out in the commentary to the effect that the list was indicative rather than exhaustive and did not constitute an absolute preclusion of termination or suspension of the operation of the listed treaties in all circumstances.

61. As to draft article 15, his delegation believed that the Charter of the United Nations and General Assembly resolution 3314 (XXIX) offered indispensable practical guidance as a legal basis for the qualification of acts of aggression. Given the disagreement concerning the inclusion of a reference to the latter for that purpose, the draft resolution should be reformulated — if that reference was to remain — in such a way as to avoid conveying the impression that the resolution had the same effect as the Charter.

62. China considered the Commission's work on the topic "Protection of persons in the event of disasters" to be of great practical significance; it was a country frequently hit by natural disaster and the timely and generous international assistance provided to boost its own swift recovery and reconstruction responses on such occasions had been gratefully received by its Government and people. On that score, the humanitarian principles articulated in draft article 6 on the topic were particularly important to regulating the provision of such assistance, which should be for humanitarian purposes only; in no way should it encroach upon the national sovereignty of the affected States, interfere in their domestic affairs or come with any inappropriate strings attached.

63. Concerning the proportionality component of the principle of impartiality articulated by the Special Rapporteur, the response to a disaster should also be in proportion to the practical needs of affected regions and peoples and to the capacity of affected States for providing their own relief and receiving relief from others. His hope was that all such points and a full explanation of the draft article would be duly set forth in the commentary.

64. The respect for human dignity and human rights covered in draft articles 7 and 8, respectively, was also

of practical significance to the full and comprehensive protection of people's rights and interests. Whether in the event of extraordinary and emergency situations created by major disasters or as a result of constraints imposed by realities on the ground, a temporary derogation from some human rights obligations might at times be necessary to ensuring prompt and efficient rescue activities; indeed, such derogation was permissible under existing international legal instruments. The relevant wording of the two draft articles would therefore be improved by allowing for a degree of flexibility, as appropriate.

65. Lastly, with regard to draft article 9, paragraph 1, the sovereignty of a State in response to natural disaster should be reflected not only in its duties and obligations but also in its right to decide, in the light of the gravity of the disaster and its own rescue and relief capacities, whether to invite other States to participate in those activities. It was a universally accepted principle of international law, enunciated in such international instruments as the annex to General Assembly resolution 46/182, on strengthening of the coordination of humanitarian emergency assistance of the United Nations, that international assistance must be provided with the consent of the affected State. He looked forward to clear confirmation of that point in the Special Rapporteur's next report on the topic.

Expression of sympathy in connection with the recent tsunami and volcanic eruption in Indonesia

66. **The Chairperson**, on behalf of all the members of the Committee, expressed sympathy to the people and Government of Indonesia in connection with the recent tsunami and volcanic eruption in their country.

67. **Mr. Wisnumurti** (Chairman of the International Law Commission) thanked the Chairperson for the expression of sympathy and promised to convey those sentiments through the Indonesian mission to the Government of Indonesia.

The meeting rose at 4.40 p.m.